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Nos. 06-340 & 06-549

Supreme Court, U.S.
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In The Supreme Court of the United States

NATIONAL ASSOCIATION OF HOME BUILDERS, *et al.*,

Petitioners,

vs.

DEFENDERS OF WILDLIFE, *et al.*,

Respondents.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Petitioners,

vs.

DEFENDERS OF WILDLIFE, *et al.*,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

OPENING BRIEF OF THE STATE OF ARIZONA

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QUESTIONS PRESENTED

1. Whether Section 7(a)(2) of the Endangered Species Act, 16 U.S.C. § 1536(a)(2), which requires each federal agency to insure that its actions do not jeopardize the continued existence of any endangered or threatened species or modify its critical habitat, impliedly repealed the Environmental Protection Agency's obligation to transfer its pollution permitting authority to Arizona under Section 402(b) of the Clean Water Act, 33 U.S.C. § 1342(b).

2. Whether the court of appeals correctly held that the Environmental Protection Agency's decision to transfer permitting authority to Arizona under the Clean Water Act was arbitrary and capricious because it was based on inconsistent interpretations of Section 7(a)(2) of the Endangered Species Act; and if so, whether the court of appeals should have remanded to the Environmental Protection Agency for further proceedings without ruling on the interpretation of Section 7(a)(2).

PARTIES TO THE PROCEEDING

The State of Arizona filed a brief in support of the petition for writ of certiorari and was an intervenor in the court of appeals.

The United States Environmental Protection Agency (EPA) is a Petitioner in this Court and was a respondent in the court of appeals. The National Association of Home Builders, Southern Arizona Home Builders Association, Home Builders Association of Central Arizona, Arizona Chamber of Commerce, Arizona Mining Association, Arizona Association of Industries, Greater Phoenix Chamber of Commerce, and American Forest & Paper Association (collectively referred to as Home Builders or NAHB) are also Petitioners in this Court and were intervenors in the court of appeals.

The following parties are Respondents in this Court and were petitioners in the court of appeals: Defenders of Wildlife, Center for Biological Diversity, and Craig Miller.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 420 F.3d 946 (9th Cir. 2005), and is reprinted at Petitioners National Association of Home Builders' Appendix (NAHB Pet. App.) at 1-68. The denial of rehearing en banc and Judge Kozinski's dissent from that denial, which was joined by Judges O'Scannlain, Kleinfeld, Tallman, Callahan, and Bea, is reported at 450 F.3d 394 (9th Cir. 2006), and is reprinted at NAHB Pet. App. 134-158.

JURISDICTION

Respondents petitioned the United States Court of Appeals for the Ninth Circuit to review EPA's decision to transfer its pollution permitting authority to Arizona under 33 U.S.C. § 1369(b)(1). The court of appeals issued its judgment and opinion on August 22, 2005, and denied rehearing en banc on June 8, 2006. Home Builders filed a Petition for Writ of Certiorari on September 6, 2006. Arizona filed its Brief in Support of Petition for Writ of Certiorari on September 26, 2006. After receiving extensions of time from Justice Kennedy, EPA filed its Petition for Writ of Certiorari on October 23, 2006. The Court granted Home Builders' and EPA's Petitions for Certiorari on January 5, 2007, and has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 7(a)-(b) of the Endangered Species Act of 1973 (ESA), 16 U.S.C. § 1536(a)-(b), and Section 402(b) of the Federal Water Pollution Control Act (Clean Water Act or

CWA), 33 U.S.C. § 1342(b), are reproduced in EPA's Pet. App. 117a-124a.

STATEMENT OF THE CASE

This case concerns the State of Arizona's efforts to obtain authority to administer the surface water discharge permitting program, known as the National Pollutant Discharge Elimination System (NPDES), in Arizona under Section 402(b) of the Clean Water Act, 33 U.S.C. § 1342(b). The EPA transferred the NPDES program to Arizona after determining that its program met the requirements of the Clean Water Act. Arizona was the forty-fifth State to obtain EPA approval of its permitting program.

Congress clearly intended the States to run the pollution permitting programs upon demonstrating that their programs met the Clean Water Act criteria. And, this Court and others have recognized that approval of the transfer of NPDES authority to a State is mandatory after it demonstrates that it meets the criteria set forth in Section 402(b). There is no dispute that Arizona met the statutory criteria. Nevertheless, a majority of a panel of the Ninth Circuit vacated the transfer of the program to Arizona on the grounds that the EPA, the transferring agency, failed to comply with the requirements of Section 7(a)(2) of the Endangered Species Act, 16 U.S.C. § 1536(a)(2).

In reaching its conclusion, the majority panel determined that the Endangered Species Act repealed the mandating language of Section 402(b) by implication, contrary to this Court's rulings, and misread the legislative history of the Endangered Species Act. The majority's views of the reach of the Endangered Species Act are not

only wrong as a matter of law, but radical in nature, potentially imposing Endangered Species Act Section 7 requirements on every decision of the United States government, even where other acts of Congress have, as here, directed agency decisions under specified circumstances. Because the court of appeals erred on a question of law, Arizona urges the Court to vacate the court of appeals' decision and order it to uphold EPA's administrative decision approving Arizona's program under the Clean Water Act.

A. Statement of Facts.

In 2001, the Arizona Legislature authorized and directed the Arizona Department of Environmental Quality (ADEQ) to establish a state pollution permitting program, known as the Arizona Pollutant Discharge Elimination System (AZPDES), which was to be consistent with the requirements of § 402(b) of the Clean Water Act. 2001 Ariz. Sess. Laws, Ch. 357, § 5 (codified at Arizona Revised Statutes Annotated (A.R.S.) §§ 49-255 to -255.03). Pursuant to this statutory authority, Arizona employees drafted and promulgated the extensive regulations necessary to obtain EPA approval of Arizona's pollution permitting program. *See* Arizona Administrative Code R18-9-A901 though R18-9-1015.

In January, 2002, Arizona applied to EPA for transfer of the NPDES program regarding Arizona waterways (except those on Indian land). (NAHB Pet. App. 7.) EPA consulted with the United States Fish & Wildlife Service (Service) under § 7(a)(2) of the Endangered Species Act concerning the effect of EPA's transfer of the NPDES program and the Service sent EPA its Biological Opinion

on December 3, 2002. (NAHB Pet. App. 77.) The Service concluded that EPA's approval of the AZPDES program was "not likely to jeopardize the continued existence of [listed] species, and is not likely to destroy or adversely modify designated or proposed critical habitat." (NAHB Pet. App. 116.) The Service's conclusion was based in part on its analysis of causation:

> Further, loss of any conservation benefit is not caused by EPA's decision to approve the State of Arizona's program. Rather, the absence of the section 7 process that exists with respect to Federal NPDES permits reflects Congress' decision to grant States the right to administer these programs under state law provided the State's program meets the requirements of 402(b) of the Clean Water Act.

(NAHB Pet. App. 114.)

On December 5, 2002, the EPA approved Arizona's application to administer the NPDES program pursuant to Section 402(b) of the Clean Water Act. (NAHB Pet. App. 69.) Arizona thus became the forty-fifth State to obtain this authority. (NAHB Pet. App. 4.) The EPA found that Arizona had met all the requirements of Section 402(b). (J.A.pp. 237) This finding is not disputed by any party. (Pet. App. 31 n.11.)

Arizona obtained the EPA's approval of its AZPDES program as the result of more than two years of effort. (Ariz. App. 6.)[1] The State invested over one million dollars in resources and staff time in creating the AZPDES

[1] This refers to the Appendix attached to the State of Arizona's Brief in Support of Petition for Writ of Certiorari.

program. (*Id.*) Arizona state employees developed new state laws and rules, prepared the submission of the Arizona program for approval, negotiated and drafted the memoranda of agreement with EPA to implement the program, and drafted the program guidance materials for the regulated community. (*Id.*) Arizona's resource commitment to AZPDES, in terms of money and personnel time, has increased substantially during the pendency of this case.

Invalidation of the AZPDES program would seriously disrupt the pollution permitting process in Arizona. If Arizona's authority to continue its program is vacated, regulated facilities would not know where to send information regarding their permits, how to send it, or what government official to contact regarding permit issues. (Ariz. App. 7.) Action on permit applications would be substantially delayed pending a determination as to what agency would take over their processing. (*Id.* at 8.)

Further, invalidation of the AZPDES program would halt or delay Arizona business activities, including construction projects that are proceeding under general permits that have been issued in the AZPDES program. For example, in 2003 the Arizona Department of Environmental Quality (ADEQ) completed promulgation of the AZPDES Construction General Permit. (*Id.*) As the Ninth Circuit majority noted, ADEQ issues several thousand storm-water-discharge construction permits annually. (Pet. App. 49 n.22.) The EPA revised its National Construction General Permit on July 1, 2003, but it does not cover construction projects in Arizona outside of reservations. 68 Fed. Reg. 39087, 39089 (July 1, 2003). If Arizona's Construction General Permit is invalid, there will be many new construction sites that would otherwise be

covered by the Arizona permit that will no longer be able to legally discharge under any authority. (Ariz. App. 8.)

In addition, invalidation of the AZPDES program may negatively affect Arizona's environment and water quality. (*Id.*) The ADEQ has implemented education and outreach efforts to ensure that the regulated community understands its responsibilities under the Clean Water Act and Arizona law. (*Id.*) Under the AZPDES program, there are more inspections of and other site visits to discharging facilities than there were when EPA was managing the NPDES program in Arizona. (*Id.*) These benefits and increased regulatory oversight would cease if the AZPDES program is invalidated. (*Id.*)

Finally, since approval of AZPDES, ADEQ has provided the United States Fish and Wildlife Service (Service) with significantly increased notice of proposed projects in Arizona that may affect endangered species. (Ariz. App. 2-3.) ADEQ requires every construction general permit applicant to submit a Notice of Intent including a unique geographic identifier. (*Id.* at 3.) The Service has provided ADEQ a geographic information system map that identifies the areas in Arizona that are of critical habitat concern. (*Id.*) ADEQ's "Smart Notice of Intent" computer system matches the identified project area with the established areas of concern provided by the Service. (*Id.*) Upon receiving a general permit Notice of Intent in an area of critical habitat concern, ADEQ informs developers that they are not authorized to discharge for thirty-two business days – thus, preventing the beginning of construction during that time. (*Id.*) ADEQ sends a copy of Notices of Intent that affect critical habitat areas to the Service. (*Id.* at 4.) The Service thus has thirty-two days to assess the impact on endangered species and contact the developer

concerning the impacts. (*Id.*) Under the NPDES program in Arizona, developers could automatically begin construction within forty-eight hours of giving notice. (*Id.* at 3.)[2]

B. Proceedings Below.

In April 2003, Respondents petitioned the court of appeals to review EPA's approval of the AZPDES program under 33 U.S.C. § 1369(b)(1)(D), which allows "any interested person" to request the court of appeals to review EPA's determinations regarding state permitting programs. Respondents contended that EPA's decision to approve AZPDES was arbitrary and capricious because it failed to follow § 7(a)(2) of the Endangered Species Act. (NAHB Pet. App. 13.) Arizona moved to intervene because it had a significant protectable interest in the EPA's approval of the AZPDES program and intended to raise a legal argument that EPA might not raise – that is, that EPA could not deny the transfer based on § 7 of the Endangered Species Act if the transfer met the requirements of § 402(b) of the Clean Water Act. (State of Arizona's Motion to Intervene, May 2, 2003.) The court of appeals allowed Arizona as well as Petitioners Home Builders to intervene. (NAHB Pet. App. 13.)

Respondents also filed a lawsuit against the administrator of the EPA and other federal officers in the United States district court in Arizona alleging, among other

[2] Although the Service opines in its Biological Opinion that Arizona's process will not provide species conservation that is equivalent to that required by § 7 of the Endangered Species Act (NAHB Pet. App. 79), the Service does not address whether EPA received sufficient notice of construction in an area of critical habitat concern to enable it to protect listed species.

claims, that the Biological Opinion that supported EPA's decision to approve AZPDES violated the Endangered Species Act. (*Id.*) The district court ordered that the challenge be severed from Respondents' other claims and transferred to the court of appeals because that court had exclusive jurisdiction over the challenge. (NAHB Pet. App. 13.) The court of appeals consolidated the transferred district court challenge with Respondents' petition for administrative review. (NAHB Pet. App. 13.)

A two-member majority of the court of appeals concluded that EPA's approval of Arizona's transfer application was arbitrary and capricious because it was based on "legally contradictory positions regarding its section 7 obligations" (NAHB Pet. App. 23), and that therefore the transfer decision must be remanded "to the agency for a plausible explanation of its decision, based on a single, coherent interpretation of the statute" (*id.* at 28). The majority then decided the legal question that it had purported to remand to EPA:

> We hold that approving Arizona's pollution permitting transfer application was an agency action "authorized" by the EPA, thus triggering both section 7(a)(2)'s consultation requirement and its mandate that agencies not affirmatively take actions that are likely to jeopardize listed species. The EPA may have complied with its obligations under the Clean Water Act, but compliance with a "complementary" statute cannot relieve the EPA of its independent obligations under section 7(a)(2). . . . Section 7(a)(2) imposes a duty on the EPA to "insure" its transfer decision is not likely to jeopardize protected species or adversely modify their habitat, and this duty exists alongside Clean Water Act provisions as

> the agency's "first priority." [TVA v.] Hill, 437 U.S. [153,] 185 [(1978)].

(NAHB Pet. App. 47.) The majority then vacated the EPA's decision to approve Arizona's pollution permitting application. (NAHB Pet. App. 63.)

Judge Thompson dissented. (NAHB Pet. App. 64-68.) He would have denied Respondents' petition for review because "EPA's authority to grant or deny the State of Arizona's application to administer the pollution permitting program was nondiscretionary." (*Id.* at 68.) "[T]herefore its decision was not 'agency action' within the meaning of section 7 of the Endangered Species Act." (*Id.* at 66.)

The respondents EPA and the Service and intervenors Arizona and Home Builders moved for rehearing en banc. (NAHB Pet. App. 134). The court denied rehearing en banc. (NAHB Pet. App. 135.) Judge Kozinski dissented from the denial and five judges joined his dissent. (NAHB Pet. App. 135-149.) Judge Kozinski disagreed with the majority's conclusion that EPA's decisionmaking was internally inconsistent and concluded that, even if there was inconsistency, the majority should have remanded to EPA for further clarification. (*Id.* at 138-39.) He also determined that the majority got it "flatly wrong" when it concluded that the Endangered Species Act required EPA to take endangered species into account when making its decision whether to transfer a permitting program under § 402(b) of the Clean Water Act. (*Id.* at 141.) The majority's interpretation "transformed the ESA into an overriding mandate that trumps an agency's obligations under its own governing statute," which was contrary to the Service's regulation, 50 C.F.R. § 402.03, and this Court's

decision in *Department of Transportation v. Public Citizen*, 541 U.S. 752 (2004). (*Id.* at 141-44.)

The court stayed its mandate pending this Court's final disposition. (Court of Appeals Order of June 16, 2006.)

SUMMARY OF ARGUMENT

I. In enacting the Clean Water Act, Congress intended that the States would administer the pollution permitting programs outlined in Section 402(b) of the Act in accordance with Section 402(b) requirements. The language of Section 402(b) is unambiguous: the EPA "shall approve" a State's application to administer the pollution permitting programs unless the applying State does not meet one of the requirements specified therein.

The panel majority erred in determining that Section 7(a)(2) of the Endangered Species Act precluded the EPA from approving Arizona's permitting program even though the program met all the requirements of the Clean Water Act. Because Section 402(b) is mandatory, the majority in effect determined that Congress impliedly repealed a portion of the Clean Water Act. This conclusion is wrong because Congress did not intend to alter Section 402(b) when it enacted the Endangered Species Act, and the two statutes can be easily reconciled.

II. Because EPA was required to approve Arizona's permitting program once it determined that the program met the requirements of the Clean Water Act, the majority should have upheld EPA's approval regardless of any inconsistencies in EPA's interpretation of the Endangered

Species Act. This Court should therefore vacate the court of appeals decision and uphold EPA's decision based on the correct interpretation of Section 7(a)(2) of the Endangered Species Act.

ARGUMENT

I. The EPA's Decision to Transfer Pollution Permitting Authority to Arizona Was Legally Correct.

A. The EPA Must Transfer Permitting Authority to a State Permitting Program that Meets the Requirements of Section 402(b) of the Clean Water Act.

The Ninth Circuit majority opinion ignored both the clear statement of congressional intent in the Clean Water Act, and its plain language, in holding that Section 7 of the Endangered Species Act expanded the requirements that Arizona must meet to receive EPA approval of its NPDES program.

In the Clean Water Act, Congress expressly stated its intent that the respective States be responsible for running the Act's several pollution control programs, including the NPDES program at issue in this case:

> It is the policy of the Congress to recognize, preserve, and protect *the primary responsibilities and rights of States* to prevent, reduce, and eliminate pollution, to plan the development and use . . . of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter. *It is the policy of Congress that the States manage* the construction

> grant program under this chapter *and implement the permit programs under Sections 1342 and 1344 of this title.*

33 U.S.C. § 1251(b) (NAHB Pet. App. 160) (emphasis added). Under Section 402(b), 33 U.S.C. § 1342(b), the EPA administrator "shall approve" each state application to administer the NPDES program "unless" she determines that the applying State does not meet one of the nine specified requirements set forth therein. (NAHB Pet. App. 165-67.)

This Court has recognized that EPA approval of a state program is mandatory when a State, like Arizona, demonstrates that it has met all nine criteria. *EPA v. Calif. ex rel. State Water Res. Control Bd.*, 426 U.S. 200, 208 (1976) ("The EPA may require modification or revision of a submitted program but when a plan is in compliance with the EPA guidelines . . . and is supported by adequate authority to achieve the ends of §§ 402(b)(1)-(9) . . . and to administer the described program, the EPA shall approve the program. . . ."). And, before the majority opinion here, the circuit courts consistently acknowledged that EPA must approve a state program if it meets the requirements of § 402(b). *Am. Forest & Paper Ass'n v. EPA*, 137 F.3d 291, 297 (5th Cir. 1998) ("The language of § 402(b) is firm: It provides that EPA "shall" approve submitted programs unless they fail to meet one of the nine listed requirements."); *Natural Res. Def. Council v. EPA*, 859 F.2d 156, 173-174 (D.C. Cir. 1988) (noting that "Congress repeatedly articulated its expectation that the States would play a major role in administering" the NPDES program and finding that it "commands the Administrator to approve the state permit system once he determines that the statutory requirements and administrative guidelines are

met"); *Citizens for a Better Env't v. EPA*, 596 F.2d 720, 722 (7th Cir. 1979) ("If the state program satisfies the statutory requirements of section 402(b) . . . and the guidelines issued under section 304(i) . . . , the Administrator must approve the program."); *Shell Oil Co. v. Train*, 585 F.2d 408, 410 (9th Cir. 1978) ("Under § 1342(b), a state may submit to the EPA" and "[i]f the state can demonstrate that it will apply the effluent limitations and the amendments' other requirements in the permits it grants and that it will monitor and enforce the terms of those permits," the EPA Administrator "must approve the proposal.").

The majority nevertheless concluded that the EPA has the "authority" and "duty" "to deny a pollution permitting transfer application that meets Clean Water Act standards but would jeopardize protected species." (NAHB Pet. App. 31.) This conclusion is contrary to the mandatory language in § 402(b) and neither the language nor the purpose of the Endangered Species Act gives the EPA the authority to override this mandatory provision of the Clean Water Act.

B. Neither the Language nor the Purpose of the Endangered Species Act Supports the Majority's Apparent Conclusion that the Endangered Species Act Impliedly Repealed Congress's Mandate in Section 402(b) of the Clean Water Act.

Without explicitly acknowledging it, the majority concluded that Congress, in passing the Endangered Species Act, intended to alter the statutory scheme for approving the transfer of NPDES authority to States. Where before a State like Arizona had to satisfy only the nine criteria expressly stated in Section 402(b), the

majority held that Congress added a tenth requirement – compliance with Section 7(a)(2) of the Endangered Species Act. The Ninth Circuit thus held that the ESA repealed, by implication, the provision of the Clean Water Act that the Director of the EPA "shall" approve a state program upon demonstration of its compliance with the Clean Water Act.

This Court has long followed "'the cardinal rule . . . that repeals by implication are not favored.'" *Morton v. Mancari*, 417 U.S. 535, 549-550 (1974) (quoting *Posadas v. Nat'l City Bank*, 296 U.S. 497, 503 (1936)). "In practical terms, this 'cardinal rule' means that '[i]n the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable.'" *TVA v. Hill*, 437 U.S. 153, 190 (1978) (quoting *Mancari*, 417 U.S. at 550). Moreover, "a statute dealing with a narrow, precise, and specific subject is not subsumed by a later enacted statute covering a more generalized spectrum. . . . unless the later statute expressly contradicts the original act or unless such a construction is absolutely necessary in order that the words of the later statute shall have any meaning at all." *Traynor v. Turnage*, 485 U.S. 535, 547-548 (1988) (internal citations and quotations omitted). "The rarity with which [the Court has] discovered implied repeals is due to the relatively stringent standard for such findings. . . ." *Matsushita Elec. Indus'l Co., Ltd. v. Epstein*, 516 U.S. 367, 381 (1996).

1. Congress did not intend for the Endangered Species Act to modify Section 402(b) of the Clean Water Act.

Congress expressed no intention to alter the Clean Water Act NPDES approval scheme when it enacted the

Endangered Species Act of 1973. Instead, it clearly intended for the requirements of the new Act, including Section 7, to be limited to actions within federal agencies' existing authorities. As originally enacted, Section 7 provided:

> The Secretary [of the Interior] shall review other programs administered by him and utilize such programs in furtherance of the purposes of this Act. All other Federal departments and agencies shall, in consultation with and with the assistance of the Secretary, *utilize their authorities* in furtherance of the purposes of this Act by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 4 of this Act and by taking such action necessary to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of such endangered species and threatened species or result in the destruction or modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with the affected States, to be critical.

Endangered Species Act of 1973, Pub. L. No. 93-205, § 7, 87 Stat. 884, 892 (1973) (emphasis added) (NAHB Pet. App. 483).

When Congress amended the Endangered Species Act in 1978, it divided Section 7 into subsections. As amended, subsection 7(a) contained, in two separate sentences, substantially the same language currently found in subsections (a)(1) and (a)(2) of the ESA. *See* Pub L. No. 95-632, § 3, 92 Stat. 3752 (1978). The 1978 amendment did not change Section 7's substantive provisions:

> The conferees adopted Senate language creating a new section 7(a), which essentially restates section 7 of existing law, and outlines the responsibilities of the Secretary and other Federal agencies for protecting endangered species. . . . The Conferees felt that the Senate provision by retaining existing law, was preferable since regulations governing section 7 are now familiar to most Federal agencies and have received substantial judicial interpretation.

H.R. Conf. Rep. No. 95-1804 at 18 (NAHB Pet. App. 487). Thus, far from expressing an intent to repeal existing provisions of the Clean Water Act, Congress intended to preserve the substance of § 7's original requirements. Congress again amended subsection 7(a) and separated it into 7(a)(1) and (a)(2) but again expressed no intent to make a substantive change. *See* Pub. L. No. 96-159, § 4, 93 Stat. 1226 (1979).

Despite this legislative history, the panel majority concluded that Congress intended to give federal agencies a substantive grant of authority when it enacted § 7 in 1973 that impliedly repealed EPA's mandatory obligations under the Clean Water Act. (NAHB Pet. App. 38.) In reaching this conclusion, the majority ignored the original language of § 7 of the Endangered Species Act and failed to acknowledge that the phrase "utilize their authorities" clearly applied to the language that is now in § 7(a)(2). The majority then bases its analysis of the meaning of § 7 in 1973 on the wrong language – that is, its analysis is based on the current language of § 7 not the language that was enacted in 1973.

> Another aspect of the statute's structure and history . . . bolsters the conclusion that section 7 includes an affirmative grant of authority to attend to protection of listed species with agencies'

> authority when they take actions covered by section 7(a)(2). Section 7(a)(1) of the Endangered Species Act directs agencies to "utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of [listed] species." 16 U.S.C. § 1536(a)(1). Section 7(a)(2), in contrast, does not refer to agencies' existing "authorities," but instead directs agencies that, when considering covered "actions," they are to proceed in a manner not likely to jeopardize listed species.
>
> The House Report indicates that this distinction between the two sections was, as one would expect, deliberate. The Report noted the requirement of present section 7(a)(2) as imposing a "*further* require[ment]" beyond that of section 7(a)(1). *See* H.R. Rep. No. 93-412, at 14 (1973). . . . (emphasis added). The contrasting language of the two sections indicates that the "further requirement" imposed by section 7(a)(2) turns on the distinction between using *existing* authority to promote conservation of species and conferring an *additional*, do-no-harm obligation – and reciprocal authority – applicable when the agency's *own* actions could cause harm to endangered species.

(NAHB Pet. App. 34-35.)

Of course, the House Report in 1973 did not support the majority's construction of § 7 because the Report commented on the original language in § 7, which required agencies to act within their existing authorities. Similarly, Representative Dingell's comments about the 1973 Act, on which the majority also relied (NAHB Pet. App. 35), are instructive in interpreting the language of § 7 as it was originally enacted but do not support the majority's conclusion that Congress intended agencies to act within their

existing authorities when "carrying out programs for the conservation" of listed species but not when insuring that their actions were not likely to jeopardize listed species.

The majority also relied on this Court's opinion in *TVA v. Hill*, 437 U.S. 153 (1978), to support its expansive interpretation of § 7(a)(2). (NAHB Pet. App. 32-35.) But *Hill* construed the language of § 7 as it was originally enacted in 1973, 473 U.S. at 160, and addresses whether a federal agency must comply with § 7 when it is acting within its existing authority, *id.* at 164 n.14. Therefore, *Hill* does not support the majority's analysis.

In sum, nothing in the language or legislative history of the Endangered Species Act indicates that Congress intended to repeal any portion of § 402(b) of the Clean Water Act. Indeed, the majority acknowledges that Congress chose not to impose the requirements of the Endangered Species Act on the States. *See* NAHB Pet. App. 6 ("By its terms § 7(a)(2) applies only to 'federal agencies' not to state governmental bodies. Accordingly EPA's pollution permitting decisions are subject to section 7(a)(2) but state pollution permitting decisions are not.").[3] Yet under the majority's analysis, Arizona must enact or agree to provisions similar to § 7 of the Endangered Species Act in order to obtain EPA approval of its permitting program.

The majority opinion found that the transfer of the NPDES program to Arizona would harm endangered species because Section 7 consultation would not be

[3] *See also* Brief of Amici Curiae States of Nebraska, et al., in Support of the Petition for Writ of Certiorari at 13 (analyzing the language and legislative history of the Endangered Species Act and concluding that States are encouraged to work cooperatively with the federal government but that such state programs are strictly voluntary).

required when Arizona was running the program. (NAHB Pet. App. 6, 47.) Although Arizona took a number of actions to increase its protection of endangered species, including its innovative "Smart Notice of Intent" program that provides early warning to the State and the Service whenever a development is proposed near critical habitat, the majority opinion makes it clear that Arizona's voluntary efforts did not suffice under Section 7 to allow the program transfer to proceed:

> In the abstract, voluntary compliance by state agencies willing to follow [Fish and Wildlife Service] recommendations to the same extent as would the EPA *might* substitute for section 7 coverage. The EPA, however, could not so conclude without first analyzing the likelihood that *all* relevant Arizona agencies can and would live up to the Game and Fish Department's promises, as well as considering the effectiveness of federal oversight if Arizona agencies fail to live up to any such promises.

(NAHB Pet. App. 60.) Thus, the majority indicated that EPA must withhold approval from a State unless it either created a statutory program substantially similar to the Endangered Species Act or agreed to consult with the Fish and Wildlife Service or National Marine Fisheries Service on all state NPDES permitting decisions. That the effect of the majority's opinion is to impose the Endangered Species Act on the States under the guise of Clean Water Act approval further reinforces the conclusion that the majority erred in concluding that Congress impliedly repealed the mandate in § 402(b) of the Clean Water Act.

2. Section 7(a)(2) of the Endangered Species Act can be easily reconciled with Section 402(b) of the Clean Water Act.

If the majority had deferred to the Service's regulation and other federal decisions interpreting § 7(a)(2) to apply only to discretionary agency actions, it could have reconciled § 402(b) with § 7(a)(2). It erred in making no attempt to reconcile the provisions.

In 1986, the agencies responsible for enforcing the Endangered Species Act, the Fish & Wildlife Service and the National Marine Fisheries Service, promulgated a regulation interpreting the scope of § 7's requirements: "Section 7 and the requirements of this Part apply to all actions in which there is *discretionary* Federal involvement or control." 50 C.F.R. § 402.03 (emphasis added) (NAHB Pet. App. 230); *see also* 50 C.F.R. § 402.16 (requiring reinitiation of formal consultation "where discretionary Federal involvement or control over the action has been retained") (NAHB Pet. App. 243). Under this regulation, § 7 did not apply to the EPA's approval of Arizona's permitting program because it lacked discretion to withhold its approval after Arizona had met the requirements of § 402(b).

Instead of finding the two statutes reconcilable by deferring to the Service's reasonable interpretation in accordance with *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the majority interpreted "discretionary" to be somehow consistent with its interpretation of § 7(a)(2) as conferring additional agency authority. (NAHB App. 40-42.) Contrary to the majority's assertion, this interpretation was not consistent with its other decisions interpreting the Endangered Species Act. As Judge Thompson noted in his dissent, the Ninth Circuit has "consistently recognized that an agency

may have decisionmaking authority and yet not be empowered, either as an initial matter or in conjunction with some continuing authority, to act to protect endangered and threatened species." NAHB Pet. App. 64-65 (Thompson, J., dissenting) (citing *Ground Zero Ctr. For Non-Violent Action v. U.S. Dep't of the Navy*, 383 F.3d 1082, 1092 (9th Cir. 2004); *Marbled Murrelet v. Babbitt*, 83 F.3d 1068, 1074-75 (9th Cir. 1996); and *Sierra Club v. Babbitt*, 65 F.3d 1502, 1508-10 (9th Cir. 1995)).

The majority could have also reconciled § 7(a)(2) with § 402(b) of the Clean Water Act by adopting other circuits' interpretation of the scope of § 7(a)(2). *See Am. Forest & Paper Ass'n*, 137 F.3d at 297, 299 (finding that the language of § 402(b) is non-discretionary and that § 7(a)(2) is not a "font of new authority" but "a directive to agencies to channel their *existing* authority in a particular direction"); *Platte River Whooping Crane Critical Habitat Maint. Trust v. Fed. Energy Regulatory Comm'n*, 962 F.2d 27, 34 (D.C. Cir. 1992) (Section 7 "directs agencies to 'utilize their authorities' to carry out the ESA's objectives; it does not *expand* the powers conferred on an agency by its enabling act.") Instead, the majority rejected the analysis of those decisions, acknowledging that there was an intercircuit conflict on the question. (NAHB Pet. App. 44.)

The majority erred in failing to reconcile § 7(a)(2) with § 402(b) of the Clean Water Act. Because § 7(a)(2) applies only to discretionary agency actions, it did not conflict with EPA's responsibility to approve Arizona's permitting program when it determined that the program met the requirements of § 402(b) of the Clean Water Act. EPA thus correctly approved Arizona's permitting program and this Court should vacate the majority's decision to vacate that approval.

II. Because the EPA Was Required to Approve Arizona's Pollution Permitting Program Under the Clean Water Act, Its Approval Was Legally Correct Regardless of Its Interpretation of Section 7(a)(2) of the Endangered Species Act.

A. The Court of Appeals Should Have Upheld the EPA's Approval Because It Was Legally Correct.

The majority determined that it "must review the EPA's actions based on the 'grounds . . . upon which the record discloses that its action was based.'" (NAHB Pet. App. 25 (quoting *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943)). The majority then concluded that it must remand to the EPA because EPA's approval of Arizona's pollution permitting program was inconsistent with its original belief that § 7 required consultation. (NAHB Pet. App. 28.) EPA has persuasively demonstrated that its position concerning § 7 consultation was not inconsistent with its decision to rely on the Service's Biological Opinion. *See* EPA's Petition at 23-25. Moreover, the *Chenery* rule does not apply here because Intervenors Arizona and Home Builders correctly argued below that EPA was required to approve Arizona's permitting program under the Clean Water Act. Thus, the court of appeals should have upheld the EPA's approval.

In *Chenery*, the Court held that, when an agency's decision involves an exercise of judgment in an area that Congress has entrusted to the agency, the reviewing court could not uphold the agency's decision based on grounds that were different from those on which the agency relied. 318 U.S. at 94-95. The Court explicitly stated that this principle did not apply when the administrative agency made an erroneous determination of law. *Id.* at 88 ("[W]e

do not disturb the settled rule that, in reviewing the decision of a lower court, it must be affirmed if the result is correct although the lower court relied upon a wrong ground or gave a wrong reason.") (internal quotations omitted); *id.* at 94 ("But if the action is based upon a determination of law as to which the reviewing authority of the courts does come into play, an order may not stand if the agency has misconceived the law.").

The lower courts have consistently held that the rule in *Chenery* does not apply to their review of an agency's interpretation of a federal statute. *See Ry. Executives' Ass'n v. ICC*, 784 F.2d 959, 969 (9th Cir. 1986) ("Generally, a reviewing court may only judge the propriety of an agency decision on the grounds invoked by the agency, . . . the court is not so bound when, as here, the issue in dispute is the interpretation of a federal statute."); *N.C. Comm'n of Indian Affairs v. U.S. Dep't of Labor*, 725 F.2d 238, 240 (4th Cir. 1984) (finding no *Chenery* problem because "the question of interpretation of a federal statute is not 'a determination or judgment which an administrative agency alone is authorized to make' ") (quoting *Chenery*, 332 U.S. at 89); *Milk Transport v. ICC*, 190 F. Supp. 350, 355 (D. Minn. 1960) (*Chenery* does not apply to the court's interpretation of a federal statute).

In this case, the court of appeals granted Arizona's and Home Builders' motions to intervene under § 509(b) of the Clean Water Act, 33 U.S.C. § 1369(b), and Rule 15(d) of the Federal Rules of Appellate Procedure. Arizona requested intervention to argue that "§ 7 of the Endangered Species Act could not legally preclude the transfer of NPDES authority to a state pursuant to 33 U.S.C. § 1342(b)." (State of Arizona's Motion to Intervene at 7.) The parties briefed that legal issue and the majority

reached the issue in holding that EPA's obligations under the Clean Water Act could not "relieve the EPA of its independent obligations under section 7(a)(2)." (NAHB Pet. App. 47.) Because the legal argument that Arizona raised was a sufficient basis for upholding EPA's approval of Arizona's permitting program, the majority erred in vacating the approval. This Court should review the EPA's decision because any inconsistencies in its decisionmaking involve the interpretation of federal statutes. Because the court of appeals misinterpreted these statutes, the Court should vacate its decision.

B. The Court Should Not Remand to the EPA Because Remand Is Futile and Detrimental to the States' Interests.

The EPA's decision to approve Arizona's program should not be remanded for clarification because this Court is free to, and should, review the court of appeals' erroneous construction of federal statutes. Moreover, the Court should not remand here because it would be futile. *See Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 756 n.7 (1986), *overruled on other grounds by Planned Parenthood v. Casey*, 505 U.S. 833 (1992). ([T]he ruling in *Chenery* has not required courts to remand in futility."). To the extent that there was any inconsistency in the EPA's position on the applicability of Section 7(a)(2) to its approval of state permitting programs under the Clean Water Act, EPA has clarified its position in connection with Alaska's application for transfer of NPDES permitting authority. (EPA Pet. App. 93a-102a.) EPA's position is that the decision whether to approve the transfer of NPDES permitting authority to a State is not subject to the requirements of Section 7(a)(2) because Section 402(b) of the Clean Water Act requires that the

State's application be granted if the Clean Water Act criteria are satisfied. *Id.* The Service and the National Marine Fisheries Service have confirmed that their interpretations of the relevant statutory provisions are consistent with EPA's. (EPA Pet. App. 103a-116a.) Thus, remand would serve no purpose as EPA has clarified its position.

Remand is also inappropriate here because, until this Court determines whether Section 7(a)(2) applies to transfers of NPDES permitting authority to a State, the status of Arizona and Alaska's permitting programs[4] is uncertain. This Court should address the question so that States in the Ninth Circuit are not governed by rules that are different from those applied in all other circuits.

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[4] The State of Alaska has applied for transfer of NPDES permitting authority and has not yet received EPA approval of its permitting program. Brief of Amicus Curiae Alaska in Support of Petitions for Writ of Certiorari at 1.

CONCLUSION

This Court should vacate the judgment of the court of appeals and uphold EPA's approval of the Arizona's permitting program.

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